Supreme Court, U.S.
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No. 97-1035

In The

Supreme Court of the United States

October Term, 1997

440 COMPANY,

Petitioner,

vs.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The Respondent, Borough of Fort Lee, a municipal corporation, and the Mayor and Council of the Borough of Fort Lee ("Fort Lee") respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit filed September 16, 1997 affirming the decision of the United States District Court for the District of New Jersey filed December 14, 1996, reproduced in the Appendix to the Petition for a Writ of Certiorari ("App.") at App. 1a and App. 3a respectively.

STATEMENT OF THE CASE

Fort Lee respectfully opposes the Petition for a Writ of Certiorari, which is, at best, confusing. The petition selectively utilizes "uncontroverted facts" or "evidence" not supported in the record and cites decisions not made or requested.

A. Course of Proceedings and Disposition of the Case Below.

The Borough of Fort Lee ("Fort Lee") enacted its first rent control ordinance in 1972. As the character of Fort Lee has changed over the years, the governing body has revised and amended the rent leveling ordinance to reflect those changes.

The original rent control ordinance was amended from time to time. The ordinance was again amended by Ordinance No. 88-25, App. 54a-58a, adopted June 9, 1989, to provide for vacancy decontrol.[1] The ordinance was further amended by Ordinance No. 90-32, App. 62a-67a, adopted September 27, 1990, to limit certain rental units to one vacancy decontrol increase after the effective date of the amendment.

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1. Vacancy decontrol permits a landlord to rent a vacant unit at the then current market price.

Following adoption of Ordinance No. 90-32 in 1990, Fort Lee Property Owners Association, an association in which petitioner 440 Company was a member, instituted an action in the Superior Court of New Jersey, Law Division, by way of Order to Show Cause, challenging Ordinance No. 90-32. The challenge focused on Section I(f) of the ordinance (App. 64a) which provided:

> The provisions of this section shall be applicable to single family homes, condominium and cooperative rental units. However, once a vacancy in such a unit occurs as defined in subsection "c" hereof, the provisions of this section shall not be applicable. It is the express intention hereof that single family homes, condominium and cooperative rental units shall be provided permanent vacancy decontrol.

Pursuant to other relevant sections of the ordinance, all other rental units were provided with partial vacancy decontrol or one time vacancy decontrol. Ordinance No. 90-32, Section I(c)(1). App. 63a.

In the Superior Court action, Fort Lee Property Owner Association claimed that providing single family homes, condominium and cooperative units with permanent vacancy decontrol, while limiting all other rental units to partial or one time vacancy decontrol, was improper and unconstitutional.

By Letter Opinion issued February 5, 1992, the Honorable Edward J. Van Tassel, J.S.C. determined that Ordinance No. 90-32, and specifically the challenged classification, be constitutional as applied.

Fort Lee Property Owners appealed and the Superior Court of New Jersey Appellate Division affirmed substantially for the reasons set forth in Judge Van Tassel's opinion.

The most recent amendment to Fort Lee's rent control ordinance was Ordinance No. 93-33A (App. 68a-70a), adopted September 14, 1993. This ordinance amended Ordinance No. 90-32 and, basically, limited vacancy decontrol to small scale landlords, *i.e.*, single-family, condominium and cooperative rental units. Vacancy decontrol was eliminated for all other rental units, such as apartments.

Petitioner, 440 Company ("440"), wanting another bite of the apple, then commenced this action on September 18, 1993 in the United States District Court for the District of New Jersey. 440 specifically challenged Ordinance No. 93-33A but tried to argue that rent control should be abolished in Fort Lee. The District Court conducted a bench trial on October 9th and 15th, 1996. Although 440 asserts that there was uncontroverted testimony presented to support its position, the District Court focused on the expert testimony presented by 440 and Fort Lee. 440 presented Susan M. Wachter ("Wachter") to testify on its behalf. Wachter basically testified as to the conclusions reached in her report which was introduced into evidence as plaintiff's trial exhibit 1002.

Wachter's report and testimony contained the following conclusions:

1. There is no shortage of housing to be resolved by the regulation of residential rents in Fort Lee.

2. Both before and after consideration of the effects of vacancy decontrol, rent control produces no noticeable positive effect on the overall housing market in Fort Lee.

3. The rent regulation has major disparate economic impacts on only a small segment of the market.

4. Rent regulation imposes major negative effects on the Fort Lee housing market through reductions in the quantity and quality of rental housing opportunities. This, in turn, reduces the aggregate real property tax base of Fort Lee and shifts the burden of real property taxes to owners of single family homes, condominium and cooperative units.

It is important for this Court to recognize that Wachter's analysis was limited to the economic impacts of rent control on the housing market in Fort Lee. In simple terms, Wachter did not investigate any other basis for rent control but instead relied on an economic impact analysis.

440 asserted that Wachter conducted an extensive two year study of the Fort Lee housing market. No evidence of any study was produced in her report or her testimony. However, to arrive at her conclusion that there wasn't a housing shortage, Wachter relied solely on information contained in the 1990 census report. In addition, in conducting her analysis, Wachter did no site inspections, never visited the Borough of Fort Lee, did not speak to the Fort Lee Tax Assessor, Rent Leveling Administrator, landlords other than the plaintiffs or tenant leaders. Wachter did no analysis of tax records to support her claim of a shift of tax burdens. Petitioner did not supply this court with these portions of Wachter's testimony.

Fort Lee presented evidence that didn't rely solely on an economic analysis of the impact of rent control. Instead its evidence addressed whether or not there is a rational basis for rent control in Fort Lee, the appropriate standard for the court to consider. The issue presented to the District Court was not what the wisest public policy might be but rather whether the ordinance has a rational basis. The criticisms of rent control as a policy contained in the Wachter report and testimony were not dispositive of whether or not a rational basis exists and

further, any rational basis for rent control, whether articulated in the ordinance or not, is sufficient to find the ordinance to be constitutional. To support the rational basis, Fort Lee presented the testimony of Kenneth K. Baar ("Baar"). Baar's report was introduced into evidence as defendant's exhibit D-3. Baar testified that the preservation of affordable housing stock in Fort Lee as well as the large rent increases resulting from decontrol provide a more than sufficient rational basis and justification for the continuation of rent control. Baar's analysis was based upon a review of population income levels versus rents and review of records of rent levels and rent increases maintained by the Fort Lee Rent Leveling Board.

Barr also explained the rational basis for the distinction created between single family, condominium and cooperative units on the one hand and multi-unit apartment buildings on the other hand with respect to the issue of vacancy decontrol under Ordinance No. 93-33A. The following factors justify this distinction and provide a rational basis for the ordinance:

1. There is a difference between the mode of operation of professional landlords owners of large multi-family buildings and small landlords who own only one cooperative, condominium or single family home or even landlords who own only a few units.

2. There is a difference in the treatment and pass-through of operating costs as they apply to condominium and cooperative owners as compared to multi-family apartment house owners.

3. There are at least two housing policy considerations which justify the distinction, those being:

A. The desire to maintain an affordable rental housing stock, and

B. Preventing the removal of condominium, cooperative and single family housing units from the rental market by excessive regulation.

4. Large multi-family apartment houses present a greater potential for harassment of existing tenants, in order to secure vacancies and decontrolled rents than do condominiums, cooperatives and single family homes.

The District Court reviewed the expert testimony and concluded by Letter Opinion that the Petitioner "failed to demonstrate by clear and convincing evidence that the ordinance is not supported by a rational basis" App. 16a. A final Order was entered by the District Court declaring Fort Lee Ordinance No. 93-33A constitutional. App. 3a-4a. The District Court obviously did not give great weight to the testimony of the other witnesses presented by 440 as that testimony did not address the rational basis for the rent control ordinance.

This judgment was affirmed by the United States Court of Appeals for the Third Circuit for the reasons set forth in the District Court's opinion. App. 1a-2a.

Fort Lee's position has been, and continues to be, that its rent control ordinance (with the present vacancy decontrol provision, Ordinance No. 93-33A) is a valid, constitutional exercise of its police power and that providing vacancy decontrol to certain types of, but not all, rental units, is a valid constitutional classification.

B. Corrections of Misstatements in the Petition.

The opinion of the United States District Court for the District of New Jersey correctly sets forth the facts of this case. In the interest of keeping the Brief brief, Fort Lee respectfully

directs the Court's attention to the District Court's opinion. The findings and conclusions contained in the District Court's opinion, accurately reflect the facts and issues in this case.

Pursuant to United States Supreme Court Rule 15.2, Fort Lee brings the following misstatements of fact in the petition to the court's attention.

440, throughout the petition, as it had throughout the prior proceedings, asserts what can be characterized as the 5% solution. 440 continually asserts that if a vacancy rate in excess of 5% exists, there can be no rational basis for a rent control ordinance. This simplistic approach ignores the fact that other bases for rent control exist irrespective of a vacancy rate that may exceed 5%.

440 also selectively refers to Fort Lee's rent control ordinances and amendments in its petition. 440 ignores the prior litigation involving Ordinance No. 90-32, (App. 62a-67a) which was upheld by the Superior Court of New Jersey, Appellate Division, *but* continually refers to Ordinance 95-25A (App. 71a-90a), an ordinance never legally adopted by Fort Lee, to bolster its argument. This invalidated ordinance is not evidence that should be considered by any court and is presented to cloud the real issues in this case.

The most glaring misstatement in the petition is the selective inclusion of testimony to establish an "uncontroverted" expert opinion. The findings of the District Court and the testimony of the witnesses contained within this Brief indicate that 440's expert opinion was far from uncontroverted. It was insufficient to meet 440's burden of proof.

A fact is not a fact merely because petitioner's attorney states so in the petition.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY THE CRITERIA GOVERNING REVIEW ON CERTIORARI.

440 does not identify the special and important reasons under Supreme Court Rule 10 for granting its Petition for a Writ of Certiorari. It is apparent that 440 seeks review of a decision of limited precedential value solely because it believes the United States District Court of the District of New Jersey reached the wrong conclusion in applying the governing legal principles from *Pennell v. City of San Jose*, 485 U.S. 1 (1988) to the facts of this case.

440 asserts that the District Court's decision is in conflict with *Pennell*. The decision is not in conflict. *Pennell* held that other bases exist to support the rationality and legitimate government objective to support a rent control ordinance. Further, there is no conflict between *Pennell* and other circuits. The decision in *Pennell* is reflective of a differing fact pattern and certainly does not constitute a "conflict" that necessitates resolution by this court.

Since the District Court correctly applied the holding of *Pennell*, 440's petition is necessarily limited to the claim that the District Court misapplied the legal standard to the particular facts of this case.

> "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court*

> *Practice*, § 4.17 at 193 (7th ed. 1993) (footnote omitted).

This admonition is particularly apt in this case given the limited precedential effect of the decision below.

II.

ORDINANCE NO. 93-33A HAS A RATIONAL BASIS AND SERVES A LEGITIMATE PUBLIC PURPOSE.

The thrust of 440's petition is that the District Court's and Third Circuit's decision is in conflict with this Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The District Court applied the holding of this Court in *Pennell* to the facts of this case.

This court has consistently affirmed that states have broad power to regulate housing conditions in general, and the landlord tenant relationship in particular, without paying compensation for all economic injuries that such regulation entails. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

This Court in *Pennell* recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare and that the primary purpose of rent control is the protection of tenants. *Id.* at 13.

Further, this Court addressed the issue of rational basis for rent control. 485 U.S. 1 (1988), concluding that legitimate and rational goals of rent control regulations included: "reducing the burden of housing costs on low income tenants" (485 U.S. 12) "the protection of consumer welfare" (485 U.S. 13), and "reducing the costs of dislocation that might otherwise result if

landlords were to charge rents to tenants that they could not afford" [a purpose not stated in the ordinance]. (485 U.S. 14, n.8).

The rational basis or purpose need not be stated in a rent control ordinance in order that ordinance to be valid. *Pennell, supra.*

The District Court relied on this Court's decision in *Pennell* and numerous New Jersey state court decisions to conclude that Fort Lee's ordinance served a legitimate rational basis.

In *Hutton Park Gardens v. West Orange Township Council*, 68 N.J. 543, 564 (1975), the New Jersey Supreme Court noted that serious housing shortage conditions have usually provided the rational basis for rent regulations. However, the Court went on to note that "one might conceive of other circumstances which might rationally persuade a legislative body that the free housing market was not functioning in the public interest." *Id.*

Moreover, as indicated by Baar, there are a host of other legitimate reasons to justify the imposition of rent control, such as addressing the inequities in the bargaining powerbetween large apartment complex landlords and their tenants, and preserving the availability of affordable rental housing in the Borough. 440's argument has been soundly rejected by the New Jersey Supreme Court and is simply an attempt to shift the burden of proof to justify the ordinance to a municipality. In fact, it was 440's burden, by clear and convincing evidence, to rebut the presumption of validity that the ordinance enjoys. 440's proffer was patently inadequate.

440 relied on the expert report prepared by Wachter and her testimony which postulates four bases alleging the absence of a rational basis to justify the continuance of rent control.

These contentions are critiques of rent control, but they fail to prove the lack of a rational basis to justify rent control. Wachter admitted that she never visited Fort Lee or did any research into the Fort Lee housing market by speaking to the Tax Assessor, Rent Administrator, *etc.* In fact, these critiques are insufficient even to compel Fort Lee to come forward with justification for the ordinance.

In attempting to meet the burden of proof required to attack the rent control ordinance, 440 relied on the Wachter report claiming that a vacancy rate of 9.5% demonstrates lack of a housing shortage[2]. 440 proffers these statistics in an effort to show that the challenged rent control ordinance has no raison d'etre and is therefore not rationally related to the legitimate end of alleviating a housing shortage. However, courts have declined to give such allegations much weight in determining whether a municipality's rent control ordinance is arbitrary and rationally unrelated to a legitimate end. *Troy Hills Village v. Parsippany-Troy Hills,* 68 N.J. 604 (1975). *See also Helmsley v. Fort Lee*, 362 F. Supp. 581, 594 (D. N.J. 1973), noting that isolated evidence of vacancy rates in a particular apartment complex is of limited value in demonstrating the absence of a housing shortage.

The court in *Troy Hills*, *supra* at 617 found that vacancy rates are at best an "oblique indication of the state of the housing market", and concluded that "a high vacancy rate in a particular complex may indicate . . . poor management, substandard construction, undesirable locations, or grossly excessive rent levels." *Troy Hills*, *supra* at 604 noting *Parkview Village Associates v. Collingswood*, 62 N.J. 21 (1972). In *Troy Hills*, the plaintiff submitted a survey of the average turnover rates of apartment complexes in Parsippany-Troy Hills showing that

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2. Baar calculated the vacancy rate at 6.8% utilizing the same census data and excluding owner occupied units.

39% of the rental units had a yearly turnover. In addition, a rental agent of an apartment complex containing 1,108 units testified that despite advertising efforts, there were an average of 20 vacancies per year. *Troy Hills*, 68 *supra* at 616 (1975).

In general, proof of the absence of a housing shortage requires careful analysis of the housing needs and income levels of the various categories of persons who actively desire to live in the community and evaluation of the availability of rental units within the municipality suitable to the needs and financial capacity of those potential tenants. *Albigese v. Jersey City*, 127 N.J. Super. 101, 110-11 (Law Div. 1974), *modified on other grounds*, 129 N.J. Super. 567 (App. Div. 1974). *Troy Hills*, *supra*, at 617.

Wachter, 440's expert, employs a simplistic analysis of vacancy rates without any reference to the specifics of the Fort Lee rental market, housing needs and income categories which patently fails to address this standard. Further, no evidence has been provided on the needs and income levels of persons desiring to rent units within Fort Lee. No evidence produced considered the relationship between the rent levels of vacant units and the rent paying ability of prospective tenants.

Wachter next posits that the number of regulated rental units is too small to have a positive impact on the Fort Lee housing market. In fact, this rationale provides a compelling basis for continuing rent control. As detailed in Baar's report, Fort Lee suffers from a severe lack of affordable housing, and the problem seems more severe in Fort Lee than in Bergen County as a whole. Preserving affordable housing by reducing the burden of housing costs on low income tenants is a legitimate and rational goal of rent control. *Pennell* at 12. Protecting the small number of rent controlled units remaining in Fort Lee and preserving the availability of this housing for all Fort Lee residents, is ample justification for rent control.

Wachter further claimed that classifications contained in Ordinance No. 93-33A have a major disparate economic impact on small segment of the market. Presumably, 440 advances this observation in support of its contention that Ordinance No. 93-33A violates the Equal Protection Clause because there is no rational basis for distinguishing among condominium, cooperative and single family dwellings from multi-family apartment units. However, this argument has already been rejected by the New Jersey Courts in *Fort Lee Property Owners Association v. Borough of Fort Lee.*

As a general proposition, the Equal Protection Clause of the Fourteenth Amendment does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The New Jersey Supreme Court has determined in *AMN, Inc. of New Jersey v. Township of South Brunswick*, 93 N.J. 518 (1983) that a multi-dwelling unit landlord is not in "all respects [a]like" the owner of a single family, condo or coop dwelling unit. *AMN*, *supra* at 526.

The court in *AMN* noted that there were other legitimate reasons for classifying owners of housing units of two or less as being exempt from certain forms of rent control. Essentially, professional landlords of multi-dwelling units or large apartment complexes, as opposed to single-family unit renters including condos and coops, are perceived as "being less caring or responsive to tenants' demands and have[ing] an unequal bargaining power . . . " *Id. See Albigese v. Jersey City*, 127 N.J. Super 101, 111 (Law Div. 1974) holding that the purpose of rent control is to prevent oppressive rental increases, especially in light of the fact that tenants have been deprived of the freedom of contract by the absence of a competitive housing market.

In addition to this, the *AMN* court recognized that many municipalities are reluctant to subject landlords of single-family rental units to the burden of complying with the complicated and burdensome provisions existing in most rent control ordinances. *Id.* This is particularly true regarding vacancy decontrol upon tenant turnovers, which can avoid the need for small unit owners to file hardship applications, which Wachter categorizes as expensive and burdensome. Other reasons supporting classification differences between professional landlords and the single-family, condo, or co-op owner have been, as stated by Baar, the

> interplay between competing housing policy considerations regarding diminution of the overall rental housing stock by maintaining the affordable rental housing and the removability of different types of rental units from rental status.

In reviewing 440 Company's petition challenging the constitutionality of Ordinance No. 93-33A, this Court must apply the holding of *Nordlinger*, *supra*, as expressed in *Albigese*, *supra* which held:

> [A]lthough the legislation could have been made applicable to all rentals, and although other suggestions might be made for a difference point of demarcation, the Court has no right to interfere with the legislative discretion so long as the result comports with rationality.

Albigese, at 116. States are accorded wide latitude in the regulation of their local economies under the police powers, and rational distinctions may be made with less than mathematical exactitude. Neither the size of the affected segment of the population nor the extent of the impact are determinative.

Gateway Apts. v. Mayor & Tp. Council of Nutley Tp., 605 F. Supp. 1161, 1166 (D. N.J. 1985). In fact, the Borough submits ample justification for the classifications of Ordinance No. 93-33A. The Baar report summarizes these bases:

1. Differences in the mode of operation of professional landlords and landlords who own only a few units.

2. Differences in the treatment of the operating costs of apartment owners and condominium owners.

3. The interplay between competing housing policy considerations regarding diminution of the overall rental housing stock, maintaining the "affordable" rental housing stock, and the "removability" of different types of rental units from rental status.

4. Differences in the potential for harassment among apartments and condominiums.

Although Fort Lee submits a rational basis supporting the classifications contained in its ordinance, it is not constitutionally required to articulate any reason. The Court in *Nordlinger* noted that

> the Equal Protection Clause does not demand, for purposes of rational-basis review, that legislature or governing decision makers actually articulate at any time the purpose or rationale supporting its classifications.

Nordlinger, U.S. at 15 *quoting United Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). The presence of these bases, coupled with the ordinance' presumption of validity, rebut any inference raised by the plaintiff that the classifications fail to pass constitutional muster.

Fort Lee, through its expert, Baar, offered substantial reasons for the continuation of rent control, including the preservation of affordable housing stock and protection of tenants from steep rent increases and displacement. The classifications contained in Ordinance No. 93-33A are amply justified, as articulated in the Baar report and detailed herein. While 440's proofs are patently insufficient and have already been rejected by other courts, the Fort Lee rationales, coupled with the presumption of validity that municipal enactments enjoy, dictate that the Fort Lee rent control scheme passes constitutional muster in all respects.

III.

DR. BAAR'S TESTIMONY WAS CREDIBLE AND CORRECTLY RELIED UPON BY THE DISTRICT COURT.

440 asserts that the District Court's acceptance of Baar's testimony was acceptance of "unsubstantiated speculation". Petition at 18. However, the same can be said as to the opinion of 440's expert, Susan Wachter. There is no conflict with any of this court's decisions regarding the District Court's acceptance of Baar's testimony. An expert is permitted wide latitude to offer opinions including those that are not based on first hand knowledge or observation. *Daubert v. Merrell Dow Pharmaceutical Inc.*, 509 U.S. 579, 592 (1993).

Quite simply the District Court disagreed with 440's analysis of the expert testimony.

The District Court focused on the opinions of the two experts in the case stating:

> In the case *sub judice*, plaintiff's expert, Dr. Susan Wachter, testified that there was no housing

shortage in Fort Lee, rents are stable, and rent regulation has no impact on the market. Dr. Wachter based these conclusions on data from the most recent national census of 1990, an analysis of Fort lee and its Rent Leveling Board as well as a study of the escrow fund. Dr. Wachter concluded that the vacancy rate of apartments in Fort Lee is 9.55%. After a study of the escrow fund, Dr. Wachter concluded that less than 1% of the housing in Fort Lee is impacted by rent control. Therefore, the doctor concluded, the rent control ordinance does not have an impact on housing in Fort Lee. Finally, Dr. Wachter noted that rent control does not necessarily provide affordable housing because it requires a comparison of rent to income. In fact, the doctor opined, rent control has decreased the value of buildings and discouraged the new construction of apartment buildings in Fort lee.

In contrast, defendant's expert, Dr. Kenneth K. Baar, asserted the three reasons previously annunciated by the United States Supreme Court for rent control, including the prevention of excessive rent increases and the maintenance of affordable housing. The doctor admitted that the rent controlled units are of a lower quality than the units which are permitted to rent at market value. Furthermore, Dr. Baar calculated the vacancy rate in Fort Lee to be 6.8%. While Dr. Baar conceded that the standard vacancy rate which indicated a housing shortage was 5% or less, he posited that this high vacancy rate could be due to landlord profit maximization strategies, *i.e.* allowing a unit to remain vacant for a longer period of time to obtain a higher rent. Therefore, Dr. Baar opined, there could still

exist a shortage of affordable housing. However, Dr. Baar also studied the 1990 census in arriving at his conclusion, and such data did not include an analysis of the income level of renters.

In his report, Dr. Baar asserted three reasons why the distinction between apartments and small rental units is rational. First, Dr. Baar stated that there were differences in the mode of operation of landlords of large apartment complexes and small scale renters. For example, large landlords are "less caring or responsible to tenants' demands" and "tend to be rent maximizers". (Report of Dr. Kenneth K. Baar, Sept. 1996). Second, condominium owners are not permitted to pass through increases in property taxes to tenants by increasing rents. Third, Dr. Baar asserted that Fort Lee eliminated vacancy decontrol because it was afraid that the continued conversion of apartments to condominiums or cooperatives would create a shortage of affordable rental housing. Finally, Dr. Baar posited that vacancy decontrol leads to landlord harassment of tenants to vacate units and increase rent. On cross-examination, Dr. Baar revealed that this harassment theory was the conclusion of a 1972 study performed in New York City. Dr. Baar also relied on the Comprehensive Housing Affordability Strategy ("CHAS") Report, which found that there was not enough affordable housing in Fort Lee based on the "feelings of observers."

App. 15a-16a

Obviously the District Court reviewed the expert reports in evidence and weighed the testimony of both Wachter and Baar

to make its factual findings. The court correctly concluded that Baar's testimony addressed the correct legal standard, which Wachter's did not, and that it properly supported the constitutionality of the ordinance.

The District Court then concluded that 440 did not meet its burden of establishing that Ordinance No. 93-33A lacked a rational basis by clear and convincing evidence.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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